STATE OF MICHIGAN

COURT OF APPEALS

LOGICAL NETWORKS, INC., d/b/a LOGICAL, Plaintiff-Appellant,	UNPUBLISHED October 1, 2002
v	No. 239779 Oakland Circuit Court
CHARLIE MURDOCK and DONNA DASILVA, Defendants-Appellees,	LC No. 02-037956-CZ

Before: Cooper, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Plaintiff, Logical Networks, Inc. ("Logical"), appeals as of right an order dismissing plaintiff's case in favor of defendants, Charlie Murdock and Donna DaSilva. We reverse and remand.

Bloomfield Computer Systems, Inc. ("BCS"), a small company that sold Hewlett Packard ("HP") computer products, hired Murdock as a sales representative in November 1993. After Murdock was hired, BCS expanded its operations and began selling HP computer products on consignment. As additional sales representatives were hired, Murdock moved into a managerial role and executed an employment agreement with BCS on April 15, 1997. DaSilva began working for BCS as a sales representative in March 1997. DaSilva was also required to sign an employment agreement as a condition of her employment. She signed the agreement on February 11, 1997. Both of the employment agreements included a non-competition clause. The clause essentially provided that for one year following their employment with BCS, defendants would not engage, either directly or indirectly, with any business that competed with BCS.

Logical, an international professional services and information technology integration company, purchased the assets of BCS in 1999. At that time, BCS assigned all of its employment contracts over to Logical. Apparently, neither BCS nor Logical explicitly informed Murdock or DaSilva that their employment contracts were being assigned to Logical. Moreover, they did not receive defendants' express permission for the assignment. Murdock and DaSilva became Logical employees and continued to work for the company until their voluntarily resignations in January 2002. After Murdock and DaSilva left Logical, they joined Pepperweed Consulting, LLC.

As BCS's successor, Logical commenced this action alleging that defendants breached their employment and non-competition agreements with Logical. Logical asked the trial court

for an *ex parte* temporary restraining order and a preliminary injunction prohibiting defendants from: (1) continuing their employment with Pepperweed; (2) soliciting and contacting customers and suppliers of Logical; (3) using Logical's confidential information; (4) soliciting Logical's employees; and (5) further breaching the employment agreements. On January 30, 2002, the trial court granted the temporary restraining order. The order restrained Murdock and DaSilva from: (1) disclosing or misappropriating Logical's confidential information; (2) soliciting and contacting Logical suppliers and customers; and (3) contacting Logical employees for employment elsewhere. In response, defendant filed a motion to dissolve the temporary restraining order on the grounds that the trial court lacked subject matter jurisdiction.

After a hearing on the issue, the trial court dissolved the temporary restraining order ruling that the employment agreements were personal service contracts and non-assignable absent consent. As such, the trial court held that Logical lacked standing to enforce the contracts and dismissed the case. Relying on *Detroit Postage Stamp Serv Co v Schermack*, 179 Mich 266; 146 NW 144 (1914) and *Hy King Assocs, Inc v Versatech Mfg Indus, Inc*, 826 F Supp 231 (ED Mich, 1993), the trial court stated that:

> under the specific terms of [d]efendants' employment agreements with BCS, [d]efendants were employed as sales representatives to promote and sell BCS products and services. Thus the contracts are "personal in nature." Under Michigan law, the agreements cannot be assigned without [d]efendants' express consent, which is lacking here. Accordingly, because [p]laintiff is not a party to the employment agreements, [p]laintiff lacks standing to enforce the same.

Logical first argues on appeal that the trial court erred when it sua sponte dismissed its complaint based on the finding that defendants' employment agreements were non-assignable personal service contracts. We review a trial court's decision to dismiss an action for an abuse of discretion. *Vicencio v Ramirez*, 211 Mich App 501, 506; 536 NW2d 280 (1995). The proper construction and interpretation of a contract is a question of law that is reviewed de novo. *Bandit Industries, Inc v Hobbs Int'l, Inc*, 463 Mich 504, 511; 620 NW2d 531 (2001). Likewise, whether a party has standing to bring an action is a question of law subject to review de novo on appeal. *Lee v Macomb County Bd of Comm'rs*, 464 Mich 726, 734; 629 NW2d 900 (2001). To the extent Logical argues that the employment contracts in this case were not personal service contracts, we disagree. However, based on the record presented, we find that defendants' actions in this case and the surrounding circumstances indicate an acquiescence to the assignment of their employment contracts.

The general rule in Michigan is that contracts are freely assignable. *Board of Trustees of Michigan State Univ v Research Corp*, 898 F Supp 519, 521-522 (WD Mich, 1995), citing *Detroit T & IR Co v Western U Tel Co*, 200 Mich 2, 7; 166 NW 494 (1918). However, it has long been established that contracts of a personal nature, which contemplate personal association and services, are an exception to this rule and are not assignable without consent. *Northwestern Cooperage & Lumber Co v Byers*, 133 Mich 534, 537; 95 NW 529 (1903); see also *Board of Trustees, supra* at 521-522. "Personal contracts are those involving a personal trust in a party or the special skills and knowledge of a particular individual or group of individuals." *Board of Trustees, supra* at 522; see also *Detroit Postage, supra* at 275-276.

In the cases relied upon by the trial court, *Detroit Postage, supra* and *Hy King, supra*, the respective factual scenarios involved a sales agent and a sales representative attempting to assign their personal service contracts. Both courts clearly held that an agent may not assign a personal service contract without the other party's consent. *Hy King, supra* at 239-240; *Detroit Postage, supra* at 274-276. We note that neither of these cases dealt specifically with an employer's assignment of rights to an employee's contract. However, the law is clear that an employee cannot be compelled to work for another employer. *Globe & Rutgers Fire Ins Co v Jones*, 129 Mich 664, 667-668; 89 NW 580 (1902), see also *Northwestern, supra* at 539. In *Globe, supra* at 667-668, our Supreme Court rejected the argument that a personal service contract to work for a specific company could simply pass to a new corporation formed by a merger. Rather, the Court held that, "the master cannot shift his liability by turning the servant over to another master . . . nor can the servant compel the master to accept the services of another person in lieu of his own." *Id*. at 668, quoting Wood, Mast & S § 91. In both situations, the Court found that the mutual consent of the parties was required to effect a valid assignment. *Id*.

In the case at bar, Murdock and DaSilva entered into employment agreements with a small company that dealt primarily with selling HP computer products. Both Murdock and DaSilva had previously been employed with HP for several years and had extensive experience working with their product line. Moreover, Murdock and DaSilva were familiar with consignment sales, an area in which BCS began participating after their employment. This prior experience, in addition to the nature of their employment and direct interaction with BCS's customers, indicates that Murdock's and DaSilva's employment contracts were based on personal trust and the special skills that each brought to BCS. See *Board of Trustees, supra* at 522; *Edison v Babka*, 111 Mich 235, 238; 69 NW 499 (1896). Accordingly, we find that the trial court properly concluded that the employment contracts at issue were personal service contracts requiring consent for a valid assignment.

Nevertheless, the fact that the contracts in question are personal service contracts does not reach the issue of whether the non-compete covenants are assignable. We note that the Michigan case law relied upon by the trial court and defendants also failed to address this issue. In point of fact, Michigan case law does not specifically address the assignability of non-compete covenants included within employment contracts. A review of the case law throughout the nation indicates a split of authority regarding the assignability of these covenants.

The majority of jurisdictions addressing this issue have concluded that covenants not to compete, made in connection with the sale of a business, are assignable on the buyer's resale of the business. Farnsworth on Contracts (2d ed), § 11.4, p 79; see also *Managed Health Care Assocs v Kethan*, 209 F3d 923 (CA 6, 2000) (applying Kentucky law); *Equifax Services, Inc v Hitz,* 905 F2d 1355 (CA 10, 1990) (applying Kansas law); *JH Renarde, Inc v Sims*, 312 NJ Super 195; 711 A2d 410 (1998). However, some jurisdictions have declined to allow the assignment of non-compete covenants. These jurisdictions have basically concluded that non-competition covenants are personal in nature and therefore unenforceable by a new employer. See *Reynolds& Reynolds Co v Hardee*, 932 F Supp 149 (ED Va, 1996); *UARCO Inc v Lam*, 18 F Supp 2d 1116 (D Haw, 1998); *Smith, Bell & Hauck, Inc v Cullins*, 123 Vt 96; 183 A2d 528 (1962). While this presents an interesting question for future resolution, we need not address this issue in the instant case in order to resolve the parties' appeal.

After a careful review of the record, it appears to this Court that Murdock and DaSilva acquiesced to the assignment of the contracts. It is important to note that express consent is unnecessary to effect a valid acceptance of an assignment. *Detroit Postage, supra* at 274. In *Hy King, supra* at 233, Mr. King contracted with the defendant to become its exclusive sales representative and thereafter proceeded to incorporate his business. However, defendant, despite its awareness of the incorporation, continued to do business with Mr. King. *Id*. at 240. In that case, the employment contract contained a clause explicitly prohibiting assignment without the employer's written consent. *Id*. at 239. The court noted that "[w]ithout this express restriction, defendant might have risked unintentionally acquiescing to assignment of the agreement to someone other than Mr. King." *Id*. Accordingly, we find that an assignment of a contract for personal services can be ratified by the conduct of the parties. See *Board of Trustees, supra* at 522.

Here, there was no provision in either employment contract regarding assignment. Nevertheless, Murdock and DaSilva went to work for Logical after it acquired BCS in 1999. Indeed, for nearly two years Murdock and DaSilva had access to Logical's customers, vendors, and other information concerning its business activities. Moreover, it appears from the record that before Murdock and DaSilva resigned, Logical had continued to implement the compensation plan in compliance with the employment contracts. Absent further evidence at trial that Murdock and DaSilva actually refused to consent to the assignments, or that Logical failed to abide by the terms of the contracts, we conclude that Murdock's and DaSilva's actions and the surrounding circumstances indicate an acquiescence to the assignments.

In light of our decision, defendant's remaining issue on appeal need not be addressed.

Reversed and remanded to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jessica R. Cooper
/s/ Joel P. Hoekstra
/s/ Jane E. Markey